

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGORY SURGICAL SERVICES, .
LLC, .
Plaintiff, . Case No. 06-cv-00462
vs. . Newark, New Jersey
July 15, 2011
HORIZON BLUE CROSS BLUE .
SHIELD OF NEW JERSEY, INC., .
Defendant. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Commencement of proceedings at 11:27 a.m.)

2

3 THE COURT: Could I have appearances, please?

4 MR. NAGEL: For the plaintiffs, Bruce Nagel, Nagel
5 Rice; and Neil Prupis, Lampf, Lipkind, Prupis & Petigrow.

6 THE COURT: Straight from -- straight from Spain, I
7 understand.

8 MR. NAGEL: Not exactly today, but I was there last
9 week.

10 THE COURT: Excellent. Okay.

11 Mr. Prupis, good to see you.

12 Okay. Who do we have for the defendants?

13 MR. PENDLETON: John Pendleton from DLA Piper,
14 Your Honor, good morning.

15 THE COURT: Okay. Good morning.

16 MR. WARDELL: And Edward S. Wardell from Kelley,
17 Wardell, Craig, Annin & Baxter.

18 THE COURT: Okay. Your clients are here, I take
19 it? Both sides?

20 MR. PENDLETON: Yes, Your Honor.

21 THE COURT: Has a settlement been reached with the
22 Glen Ridge folks?

23 MR. PENDLETON: Yes, Your Honor.

24 THE COURT: Has the settlement agreement been
25 signed, Mr. Prupis?

1 MR. PRUPIS: The settlement agreement is signed.

2 THE COURT: Okay.

3 MR. PRUPIS: There's only one open issue.

4 THE COURT: What's the one open issue?

5 MR. NAGEL: Well, the open issue is the fact that
6 the settlement agreement is signed does not answer the
7 question as to whether there's a dismissal or the Court will
8 dismiss the case.

9 THE COURT: Well, I understand that. And that's
10 going to be -- that'll be something I'll take under
11 advisement when I get all the briefs. I'm not going to do
12 anything today. I know you filed a motion to amend. I'm
13 going to ask Mr. Pendleton if he can get me the opposition
14 sometime sooner than later, not in a regular motion cycle.
15 It would be helpful if I could have it, like, a week from
16 Monday.

17 MR. PENDLETON: You can it a week from Monday,
18 Judge. That'd be fine.

19 THE COURT: And I'll take -- and then you can do
20 the reply following week, Mr. Nagel. And I'll take
21 everything under advisement. I'm not going to -- I don't
22 think I need oral argument before I read all briefs. The
23 motion -- I'm not going to enter a dismissal order yet, but
24 I'm going to read everything, and I'm going to read your
25 motion to amend papers and I'll read the opposition and I'll

1 decide -- clearly if the motion to amend is disallowed, then
2 the case is closed. If the motion to amend is allowed, then
3 a dismissal order will not be entered, so they're connected.

4 MR. NAGEL: I agree they're connected. As long as
5 Your Honor holds that and I appreciate that.

6 The other issue that Your Honor must be aware of is
7 that under ERISA we have claim for attorneys' fees, both in
8 relation to this settlement and the Wayne Surgical settlement
9 that we were advised has just been finalized as in a couple
10 days ago. So for -- to the extent that your -- either
11 Your Honor or Judge Linares has got to hear the ERISA
12 application for fees, the case needs to be -- remain --
13 remain open as well. And we will submit a supplemental
14 letter brief on that issue.

15 THE COURT: I thought that the fees were part of
16 the settlement.

17 MR. PENDLETON: Your Honor, I believe that the
18 obligation to pay the fees would be Glen Ridge and Wayne's.
19 And Mr. Prupis and Mr. Nagel have asserted liens as to the
20 Wayne settlement proceeds that will be paid to Wayne, and
21 they need to work out with their client, their former client,
22 Wayne Surgical, what portion of the settlement amount is --
23 are their piece. But they're --

24 THE COURT: So let me understand this. The
25 settlement that was reached in this case was for a lump sum

1 inclusive of fees or exclusive of fees?

2 MR. PENDLETON: No, inclusive of fees.

3 MR. NAGEL: It doesn't say that.

4 THE COURT: Okay. Well, that needs -- that's a key
5 term. If it's inclusive of fees -- if there's a judgment in
6 an ERISA case after a jury trial, like any other fee-shifting
7 case, then there's a separate application for fees.

8 If there's a settlement, the settlement has to be
9 clear whether it's inclusive or exclusive of fees. It's that
10 simple.

11 MR. PENDLETON: Your Honor --

12 THE COURT: It can't be silent. It has to say it.
13 If it's inclusive, then it turns on the relationship between
14 the lawyer and the client for the plaintiff. If it's not
15 inclusive, then you make a separate application for fees.
16 But it will be governed by the settlement agreement.

17 MR. PENDLETON: Your Honor, the settlement
18 agreement I passed up to your clerk earlier, which I hope you
19 have a copy in front of you.

20 THE COURT: I do.

21 MR. PENDLETON: Signed by Glen Ridge Surgicenter
22 indicates on the first page in the last --

23 THE COURT: Hold on. Let me get it. Let me get a
24 copy. The one that's signed that was signed on the 14th,
25 which was yesterday.

1 MR. PENDLETON: Yes, Judge.

2 THE COURT: And there's an amendment to the
3 ancillary service provider agreement too. An amend- -- I got
4 the amendments. But the --

5 MR. PENDLETON: On the very first page, it
6 indicates that the claims are being dismissed.

7 THE COURT: Which paragraph?

8 MR. PENDLETON: The last "whereas" paragraph on the
9 first page of the confidential settlement agreement and
10 mutual general release.

11 MR. NAGEL: It says there's a "whereas" clause, but
12 it is our view under ERISA law that can -- our claim, the
13 lawyers' claim, cannot be waived. And we'll brief that,
14 Judge.

15 THE COURT: Well, I want to know what the
16 understanding of the client is, because they're -- they can
17 be waived. ERISA cases settle all the time. If the client
18 accepts -- there's a client, and if the client says I'll
19 accept this settlement, I understand that it's inclusive of
20 fees, and I have a separate fee agreement with my attorney,
21 then you have no right. If it explicitly says it includes
22 fees, this -- this amount that we're paying is inclusive of
23 fees, you don't have a statutory right.

24 MR. NAGEL: I -- Judge, I believe --

25 THE COURT: So it really turns on the understanding

1 of parties, what the meeting of the minds is of the parties
2 on the issue of fees.

3 MR. NAGEL: I'd like to brief that. I believe --

4 THE COURT: Well, I'd like to have your client take
5 the stand right now, if it's okay, and und- -- there's a --
6 there's clearly a disconnect between the two parties right
7 now about fees. If his understanding is it does include
8 fees, then you have an uphill battle convincing any court
9 that you should have a separate agreement, a separate
10 application for fees. If he says "I'm not sure" or "I don't
11 know" or "it does not," then that's something very different.

12 But settlements are independent mechanisms for
13 parties to resolve differences. There are ERISA cases
14 settled every day in this Court where they are inclusive of
15 fees, and the parties have that expectation when they settle.
16 There's other cases where they -- they say we'll carve out
17 the fees and let the Court decide it.

18 But it really depends on what the meeting of the
19 minds as to settlement. If the parties' agreement is we --
20 we agree that this was everything, including fees, you can't
21 make a motion for fees after that if it's inconsistent with
22 the ruling [sic] of the parties.

23 So what I'd like -- so I'm not -- I'm not hearing a
24 motion on fees unless we make a resolution today as to what
25 the intent of the parties are. Mr. Pendleton has made a

1 representation that his understanding that it's inclus- -- it
2 is inclusive of fees.

3 MR. NAGEL: Judge, can I suggest two things.
4 Number one, I was not prepared -- quite frankly, today is my
5 anniversary, I wasn't even supposed to be here. I would like
6 the opportunity to review this issue with the client. Apart
7 from my understanding that the client cannot waive our claim
8 to fees, that's been my understanding, Your Honor obviously
9 has a different view. I'd like to brief it. And before --

10 THE COURT: I want -- I think -- Mr. --

11 MR. NAGEL: Before there's any hearing, Judge, I
12 would like the opportunity to brief the law and talk to my
13 client about this issue.

14 THE COURT: You can talk to your client in 10
15 minutes. Mr. Nagel, we're having -- I asked -- I did it -- I
16 had a conference call with everyone three days ago, and I
17 said I want -- I want to have this -- there's a settlement or
18 there isn't a settlement. It's not that complicated. I sent
19 a text order two days ago, and I said, if a settlement is not
20 reached, we're going to have a hearing today, and you're
21 going to have your clients present. That is unambiguous.

22 You have your clients here. There's a disconnect
23 on the issue of fees. I'll give you a short break to talk to
24 your client. But I want to hear from both sides. This is a
25 hearing. And I want to find out what the expectation is in

1 the -- whether there's an agreement as to fees. Because if
2 your client says it doesn't include fees and Mr. Pendleton's
3 client says it does include fees, then we're -- then we're at
4 an impasse. We don't have a settlement of this case. And
5 then we have to decide whether or not there's a motion to
6 enforce the settlement or not, whether there's a meeting of
7 the minds. That's the step.

8 But it's not that complicated. If they both agree
9 it included fees, then we have a settlement. If they -- if
10 one side says it does and one side says it doesn't, then we
11 have a problem, because this case has gone on for four years,
12 and if at the end of the day, there's a fee application for a
13 million dollars, I am sure that defendants are going to say,
14 plaintiff, rather -- defendants, rather, are going to say,
15 there's no settlement because we didn't expect to have to pay
16 a huge amount of fees on top of this. If the expectation --
17 it's a very simple question. You've negotiated this for
18 weeks now. Does it include fees or does it not include fees?
19 That's all.

20 MR. NAGEL: We didn't -- we, as lawyers, didn't
21 negotiate anything. This was -- again, as we certified, this
22 was given to the client. The draft was given without our
23 review. And it was handed to us. This was done behind our
24 back. And Your Honor says, well, you're in it now, so you
25 could cure whatever defect. So we didn't negotiate the fees,

1 and we're not in a position to do it.

2 Now, obviously, obviously, I'd like to put counsel
3 on the stand. If we're going to have a hearing on the
4 expectation of the parties, let the lawyers and Ms. Sherry
5 was here, let her testify as to what --

6 THE COURT: Mr. Nagel --

7 MR. NAGEL: -- what she did as well.

8 THE COURT: -- in my courtroom I decide who
9 testifies. I wanted the clients here for a reason. It's a
10 very simple, uncomplicated issue. I want to know if there's
11 a settlement, if there's a meeting of the minds of the
12 parties on the issue of fees. That's it. Nothing more
13 complicated than that. So we're not going put law- -- we're
14 going to put clients on the stand today, and we're going to
15 say "What is your expectation?" That's it. If there's no
16 meeting of the mind -- I'd like to hear from Mr. Pendleton,
17 if the meeting -- if the position is it does not include
18 fees, what is your client's position as to settlement?

19 MR. PENDLETON: There is none.

20 THE COURT: There is none. So let's find out what
21 it is. If there's none, then we keep going forward. It's
22 very simple. His -- his position is if it's fees, there's no
23 settlement. If your client says it does not include -- it
24 does [sic] include fees and Mr. Pendleton's client says it
25 does, absolutely does include fees, then we don't have a

1 settlement, and we go forward.

2 But that's something that we need to -- that is not
3 something that is -- it's one question to both clients.
4 That's it.

5 MR. NAGEL: And -- so --

6 THE COURT: So you can either represent to me
7 that -- you could talk to your client and you could say
8 whether it does or it doesn't, and Mr. Pendleton could talk
9 to his client and report back to me. But it's not -- it
10 really turns on the intent of the parties, not the intent of
11 the lawyers. It's the intent of the parties.

12 MR. NAGEL: And as I understand it, Your Honor is
13 not going to allow me to put a record in in terms of the
14 lawyers that were involved in negotiating the deal?

15 MR. PENDLETON: Your Honor --

16 THE COURT: No, I'm going to ask this. I want
17 you -- I'm giving you a break. I want you to talk to your
18 client and come back and make a proffer to me as to whether
19 there's a meeting -- because there's a settlement agreement
20 here that's signed, and it says on it, "Whereas the parties
21 are desirous of resolving any and all claims, disputes among
22 them, which relate to the reimbursements paid by Horizon for
23 services and supplies provided by GSS, including any claims
24 which were raised or could have been raised in this action
25 against GSS, against Horizon, together with claims for

1 attorneys' fees or costs, and have agreed to implement an
2 agreement governing these future relations."

3 So the "whereas" paragraph suggests pretty clearly
4 that this is an attempt to resolve everything, including
5 attorneys' fees.

6 So I need a very simple question from your client.
7 The -- it's a -- it's a four -- it's a six- -- five-page
8 agreement. Actually it's a three-page agreement. The fourth
9 and fifth pages are signature line. It says that -- the gist
10 of the settlement agreement is Horizon shall pay to GSS the
11 sum of \$112,000, and the parties have entered into
12 participating provider agreement. They've entered into an
13 agreement. They've agreed to pay the claims and that there's
14 a mutual release and dismissal.

15 So the -- it's not a complicated agreement. It's a
16 very simple agreement.

17 And the only issue is does that \$112,000 include
18 attorneys' fees. It turns on the intent of the parties.
19 That's it.

20 So you talk to your client and you talk to your
21 client, and you come back and make a proffer to me. If you
22 say to me, it does -- I've talked to my client, it does not
23 include fees, then the answer is -- and Mr. Pendleton comes
24 back and says it does include fees, I guess we don't have a
25 settlement.

1 MR. NAGEL: Well, but I think Your Honor also is
2 side-stepping the argument I made earlier. I'm under the
3 impression -- and potentially I'm wrong legally -- but I'm
4 under the impression that a ERISA application for fees cannot
5 be waived by a client.

6 THE COURT: Well, I'm not under that impression.

7 MR. NAGEL: Okay.

8 THE COURT: And despite whatever law you may cite
9 to me, it is a fundamental premise of contract law and
10 settlements that the parties can resolve disputes, they're
11 represented by counsel, they're sophisticated, you signed a
12 settlement agreement. Does it include fees or does it not
13 include fees?

14 It's incredibly important because frankly the fees
15 well trump the \$112,000 that are here. So if you say to me,
16 I think my client was under the expectation that I can make a
17 separate motion for fees and that Horizon would be obligated
18 to pay fees above and beyond this \$112,000, then -- and at
19 the same time Horizon says, that is not what I intended, we
20 don't even get to the issue of whether or not you can or
21 can't make an application for fees, there's no meeting of the
22 minds. It's in every fee-shifting case. You either include
23 it or you don't include it. If -- if there's no meeting of
24 the minds on it, then there's no settlement. It's that
25 simple. It's that simple.

1 MR. NAGEL: I have Your Honor's direction. I will
2 do that --

3 THE COURT: You can't -- because what you can't do,
4 Mr. Nagel, is say -- let me finish. What you can't do is
5 say, this is -- we think it means X and they think it means
6 Y, so we're going to then have -- I'm going to make a motion
7 for fees, and then we'll have a hearing on it, because that
8 hearing is going to turn on what was -- was there a meeting
9 of the minds on the issue of fees. If there wasn't a meeting
10 of the minds, there's no settlement.

11 So that's what -- before we get to having a
12 settlement and then having you make a fee application and
13 then having to resolve the same issue, I want it resolved
14 today: Is there a meeting of the minds on fees? If there is
15 not a meeting of the minds, we don't have a settlement. It's
16 that simple.

17 MR. NAGEL: Judge, I will follow that instruction.
18 I will --

19 THE COURT: Okay. I'll be back in 5. Thank you.

20 MR. NAGEL: Before Your Honor breaks, can I raise
21 one other issue?

22 THE COURT: No. We'll come back when -- when I'm
23 ready. Take -- I want you talk to your clients, and we'll
24 come back.

25 (Recess: 11:41 a.m. to 12:09 p.m.)

1 THE COURT: Okay, gentlemen, when we broke --
2 before we broke, we were -- I was trying to ascertain whether
3 there was a settlement in the case. And the issue is pretty
4 simple. It is whether the settlement that's agreed to, core
5 terms being a participating provider agreement, payment of
6 \$112,000, mutual release, and dismissal of this action --
7 Glen Ridge's claims in this action, also -- is also includes
8 attorneys' fees. Specifically whether the payment of 112
9 includes attorneys' fees.

10 I asked you to meet with your clients separately
11 and to report to the Court whether or not that core term had
12 been agreed to.

13 MR. NAGEL: There was discussion about attorneys'
14 fees, so we will not press it from the client's point of
15 view. We're reserving the right to confirm whether I'm right
16 or wrong on the law, that it may or may not be waivable.

17 THE COURT: Let me -- let me stop you --
18 Okay. I had a very simple question.

19 MR. NAGEL: Yes.

20 THE COURT: And the issue -- the question is I want
21 to understand whether there was a meeting of the minds on the
22 core terms of the agreement. Settled New Jersey law.
23 Settled law everywhere.

24 MR. NAGEL: The answer is yes.

25 THE COURT: And the answer -- let me just finish.

1 And the issue is if the expectation of your client
2 in the settlement agreement was to -- that it did include
3 fees or didn't include fees would be a key term because it
4 would far exceed what the payment of 112 is. Is 112 -- is
5 your client's understanding that it did include or didn't
6 include fees, because that's what it's going to turn on.

7 MR. NAGEL: It did, but that doesn't bear on the
8 legal issue as to --

9 THE COURT: Okay. So that's my answer. So --

10 MR. NAGEL: Yes.

11 THE COURT: -- your client's expectation is that
12 the 112 was inclusive of fees.

13 MR. NAGEL: It did, but it did not -- it did not
14 deal with the legal issue that I'm reserving on. It may not
15 be a legal issue after I verify the law.

16 MR. PENDLETON: Your Honor, I just want to be very
17 clear on behalf of Horizon, and I don't want to mince words.
18 I've kept my mouth shut for a lot of stuff that's been said
19 about the negotiations here that is untrue.

20 This is the fact: If \$112,000 is not the sum total
21 that Horizon is to pay to settle the Glen Ridge case, then
22 there's no deal. If Mr. Prupis and Mr. Nagel want to make a
23 claim for counsel fees, there's no deal, there's no
24 participating agreement, we're done, we're back in litigation
25 and we'll proceed. We've made that clear to Mr. Prupis and

1 Mr. Nagel throughout.

2 So the answer is either we have a deal and it's
3 112,000 and par [phonetic] agreements or we have no deal.
4 That's it.

5 MR. NAGEL: I have no idea what Mr. Pendleton's
6 referring since he never negotiated any of this with either
7 Mr. Prupis or I, never made anything clear. This was all
8 done through the back channels, as I put in the papers.

9 There is a settlement agreement reached by the
10 clients. I'm simply reserving on a legal issue that I may or
11 may not be right on.

12 THE COURT: Let me -- let me just give you a little
13 advice and heads-up where I'm headed. If you're -- if your
14 position today is my client's understanding and expectation
15 was that the 112 included fees, then I would be disinclined
16 to entertain any application for attorneys' fees. I want you
17 to know that your client's in the courtroom today, I want it
18 to be loud and clear.

19 MR. NAGEL: I understand.

20 THE COURT: Because that -- that is what
21 settlements are about. Clients negotiate. There's some
22 cases where the clients agree, this is the amount and we'll
23 let the court decide the amount of fees. That happens in
24 civil rights case. It happens in employment cases. It
25 happens in ERISA cases.

1 There's other cases where there's fee shifting
2 where the parties agree that it includes fees.

3 So I want you to know that it is not my
4 understanding of the law that you can make an application for
5 fees when there's a meeting of the minds of the parties that
6 the 112 includes fees. And it really turns on the parties.
7 It doesn't turn on the lawyers. It turns on the
8 understanding and expectation of the parties. You've just
9 represented to the Court -- correct me if I'm wrong -- that
10 it's your par- -- your client's expectation that the 112 was
11 inclusive of fees. Is that correct?

12 MR. NAGEL: I did represent that.

13 THE COURT: Okay. So I will report to
14 Judge Linares that there is a signed settlement agreement,
15 that it was the clients' expectations, both the plaintiff and
16 the defendant, that it was inclusive of fees.

17 I -- I know that there's a motion to amend pending.
18 I will take that under advisement. There'll be no order of
19 dismissal entered until this motion is decided. I'm not
20 certain whether I will handle it or Judge Linares will handle
21 it. I'm not certain whether either of us will request oral
22 argument. So I will give you a full and fair opportunity to
23 file opposition and reply briefs and put before me anything
24 that you feel is necessary with respect to your motion.

25 So today is the 15th. Mr. Pendleton, could you

1 have your opposition by July 25th?

2 MR. PENDLETON: Yes, Your Honor.

3 THE COURT: Okay. And Mr. -- Mr. Prupis,
4 Mr. Nagel, would it be possible to have the following Monday
5 your -- which would be August 1st, to have your reply brief?

6 MR. NAGEL: We will.

7 THE COURT: Okay. And I'll try to get this done as
8 quickly as possible. After I get all the briefs in, I'll let
9 you know whether there'll be oral argument or whether
10 Judge Linares will be handling it.

11 Okay? Anything further?

12 MR. NAGEL: Yes, Judge.

13 MR. PENDLETON: Your --

14 THE COURT: Yes.

15 MR. WARDELL: Your Honor, just so I'm clear, when
16 we say the agreement was inclusive of fees and we meant that
17 the release means they release any claim they had for
18 attorneys' fees under ERISA or any other statute.

19 THE COURT: That's my understanding.

20 MR. WARDELL: Thank you.

21 THE COURT: Yes, Mr. Nagel.

22 MR. NAGEL: Yes, Judge. Your Honor is aware that
23 the last time we were in court, there was an issue with
24 regard to Mr. Pendleton's application to in effect dismiss
25 the action. Your Honor ruled against it and permitted us

1 leave to file an amended complaint.

2 THE COURT: I didn't rule against anything,
3 Mr. Nagel. The record both times will speak for itself. I
4 said out of an abundance of caution, since I wasn't clear on
5 Wednesday whether the parties had a meeting of the minds on
6 the settlement of this case, I would hold it in abeyance
7 until Wednesday. The briefing that I got up to Wednesday did
8 not indicate that you had a new class representative waiting
9 to serve as class representative. Your briefing up to that
10 point said you may have one. I said, if you a motion to
11 file, file it in accordance with the rules of civil
12 procedure. I will take everything under advisement in
13 accordance with the rules of civil procedure.

14 MR. NAGEL: I was addressing a different issue,
15 Judge.

16 THE COURT: Okay. What's your issue?

17 MR. NAGEL: Okay. But before I address that issue,
18 let me just respond to what Your Honor said.

19 THE COURT: I don't need a response. I really --
20 I -- I think I've been --

21 MR. NAGEL: But there was a factual --

22 THE COURT: -- if you need to say something, please
23 say it briefly --

24 MR. NAGEL: I will.

25 THE COURT: -- because you're trying my patience,

1 Mr. Nagel, today.

2 MR. NAGEL: I appreciate that. And I'm not
3 intending to do so.

4 In that telephone conference we had in this matter,
5 I informed Your Honor that we had at least one new plaintiff.
6 I didn't say "we may." I informed Your Honor that we had.

7 THE COURT: In a conference call. In your papers
8 submitted on Monday, you said you may have one. You didn't
9 say you had one. And I said to you, then file a motion to
10 amend in accordance with the rules of civil procedure, which
11 you did the following day.

12 MR. NAGEL: Let me move to the other issue. I
13 don't agree with that, Your Honor, but I'm going to move to
14 the other issue.

15 The other issue I'm raising is Your Honor granted
16 leave to file an amended complaint, which we did. Out of the
17 abundance of caution, we filed it under seal because as
18 Mr. Pendleton had argued, we hadn't properly pled the
19 specifics of the scheme. Your Honor found that our amended
20 complaint did plead the specifics of the scheme and allowed
21 us to move forward. That was at least a month or so ago.

22 What I'm suggesting now is this. There is a
23 possibility now, based upon Mr. Pendleton's current
24 application, which was first defined in his July 14th letter,
25 that he wants a dismissal based upon the settlement. There

1 is a possibility that that will done. And that dismissal
2 will then raise potential -- I don't know if they're bona
3 fide -- but potential statute of limitations defenses and
4 potentially limit the damage period.

5 Therefore, since we've moved to amend with regard
6 to one of the centers and since I expect to have several more
7 in the next few days, I will probably be filing new actions.
8 I would like to file those new actions not under seal, the
9 same way that we had moved before Your Honor in this case to
10 allow the amended complaint, which we filed per Your Honor's
11 direction --

12 THE COURT: What's your request?

13 MR. NAGEL: That Your Honor rule on our application
14 that the complaint we filed in this case --

15 THE COURT: There's no application. If you want to
16 file a separate action anywhere in America, you do it in
17 accordance with principles of good lawyering and accordance
18 with the federal rules of civil procedure. I'm not going to
19 offer advisory opinions. There's a motion to amend before
20 me. There's one motion. I have a briefing schedule. I'll
21 take it under advisement. I'm not offering advisory
22 opinions.

23 MR. NAGEL: No, I'm not asking that. There's a
24 pending motion, Judge. We filed it already. I'm asking you
25 simply to decide it. In this case.

1 THE COURT: The motion to seal.

2 MR. NAGEL: No, Judge. Let me give Your Honor what
3 happened.

4 Your Honor granted us leave -- last time we were
5 physically in court, Your Honor granted us leave to file an
6 amended complaint, which we did.

7 THE COURT: I remember.

8 MR. NAGEL: We filed it out of an abundance of
9 caution under seal. And then we filed a motion and said it
10 does not have to be under seal. Your Honor gave until the
11 next Monday, any objections by Mr. Pendleton. He gave
12 objections. We filed the motion. That's pending.

13 All I'm asking -- we've already filed it. I'm
14 asking if Your Honor would decide it.

15 THE COURT: I'm not going to decide it now. I'll
16 decide it under advisement on my terms, on my schedule,
17 you'll get a ruling. I'm not ruling on it right now. Be
18 guided accordingly.

19 Anything further?

20 MR. PENDLETON: Your Honor, just want to remind the
21 Court that we talked about this in the conference call the
22 other day, and this was one of the two motions I said we
23 would hold in abeyance; Your Honor agreed that they'd be
24 stayed pending what happened here with respect to this
25 settlement.

1 THE COURT: Right.

2 MR. PENDLETON: We have never responded to that
3 motion. And I would just ask if -- if we're going to be --

4 THE COURT: Same briefing schedule. Do it by next
5 week.

6 MR. PENDLETON: Okay. Thank you.

7 THE COURT: The 25th. Okay? Thank you.

8 (Conclusion of proceedings at 12:20 p.m.)

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Certification

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July 22, 2011

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